United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-1045

To be argued by
JOHN NICHOLAS IANNUZZI

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1045

UNITED STATES OF AMERICA,

Appellee,

—v.—

LOUIS CIRILLO,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

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Docket No. 77-1045

UNITED STATES OF AMERICA,

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—v.—

LOUIS CIRILLO,

Appellant.

BRIEF FOR APPELLANT

Statement of the Case

Louis Cirillo appeals from an order of the United States District Court for the Southern District of New York (Edward Weinfeld, J.), rendered January 19, 1977, denying his motion to vacate an illegally enhanced sentence imposed May 25, 1972, sentencing defendant, pursuant to 21 U.S.C. § 851, as a second narcotics felony-offender, to imprisonment for two concurrent terms of twenty-five years.

Statement of Facts

The official court records

According to the official court records on file in this case in the office of the Clerk of the Federal District Court for the Southern District of New York, the follow-

ing is a chronological list of events or occurrences relevant to this appeal (see Motion Exhibit B, p. A. 33).[1]

March 17, 1972, a two-count indictment was filed herein charging the defendant with the crimes of possession with intent to distribute a controlled substance (Count 2) and a conspiracy so to do (Count 1);

April 17, 1972, a jury trial was begun;

April 18, 1972, trial continued;

April 19, 1972, trial continued;

April 20, 1972, trial continued;

April 21, 1972, trial adjourned due to defendant's illness;

April 21, 1972, filed order of Weinfeld, *J.* to transport defendant for medical attention;

April 21, 1972, Second Offender Information filed in the Clerk's Office;

April 24, 1972, trial continued;

April 25, 1972, trial concluded. Jury verdict determined defendant to be guilty as charged;

May 25, 1972, defendant was sentenced as a Second Felony Offender to 25 years in prison on each count of the indictment, the sentences to run concurrently with each other, followed by a term of special parole of 10 years upon expiration of confinement.

As the first order of business addressed to the court at the above said sentencing, United States Attorney Whitney North Seymour, Jr., represented that:

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[1] References in parentheses are to pages in the printed Appendix.

> " * * * there is one clerical error in the docket sheet downstairs that I would like to ask be corrected *nunc pro tunc* on the order. This [Second Offender] Information was in fact filed on April 12th. The docket sheet has the date transposed as being April 21st, which would make it actually after the commencement of the trial and is an error." (A. 13)

Significantly, Eddie Aponte, presently the orders and appeals clerk in the office of the Clerk of the New York Southern District Court, who has been employed in the said Clerk's office for 21 years, testified at a hearing below that the Second Offender Information itself (Motion Exhibit C, Hearing Exhibit 1, p. A. 37) was officially stamped and recorded as having been filed April 21, 1972; there was no indication, official or otherwise, that April 21, 1972 was an incorrect or erroneous filing date; and that the docket sheet herein (A. 34) which was made up from the actual filed documents—as are all docket sheets—accurately and correctly reflects the exact, proper, and official filing date, April 21, 1972.

More significantly, Mr. Seymour, at the sentencing, never asked that the filing date stamp on the Information be corrected *nunc pro tunc*, or any other way. He merely asked to correct the allegedly transposed docket sheet entry.[2] Moreover, although Mr. Seymour handed a copy of the Information to the court at sentencing (A. 13), it was a non-date-stamped copy, as the original which bore the date of filing as April 21, 1972, was in

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[2] A comparison of the date stamp on the Second Offender Information (Motion Exhibit C, Hearing Exhibit 1, A. 37) and the date on docket sheet which Mr. Seymour represented was transposed (Motion Exhibit B, A. 34) clearly shows that the docket sheet and the Second Offender Information bear exactly the same date.

the court file. The sentencing proceedings support the assumption that neither the court, Mr. Seymour, nor Mr. Kreiger, then defense counsel, had the benefit of the stamped original before them on that occasion.

There is nowhere to be found in the record or court file of this case, nor in the minutes of the hearing presently appealed, any testimony, documentation, affirmation, affidavit, record, log, or any other fact whatever to support the allegation that the Second Offender Information herein was filed on any day other than April 21, 1972. Further, there is nothing whatever to affirm or even account for the statement of Mr. Seymour that the docket sheet bore a transposed date.

As aforesaid, upon the hearing held to determine the actual facts concerning the filing of the Information herein, the evidence showed unequivocally and without contradiction that the actual Second Offender Information filed with the Clerk of the District Court bears the Clerk's official filing date of April 21, 1972 (A. 37).[3]

Evidence at the hearing below

Eddie Aponte, the Deputy Court Clerk aforesaid, was called by the defendant as a witness. He testified that a document is hand stamped with a date stamp "when it is first received in the Clerk's office" (A. 72) and, thereafter, a record of such filing is entered on the case docket sheet (A. 72). Regardless of when it is typed, whether the same day, the next day, or whenever, the docket sheet merely reflects the date of filing as hand stamped on the actual filed documents (A. 73). Mr.

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[3] At one point in the testimony, the hearing court impatiently acknowledged the obvious fact that anyone looking at the records on file in the Clerk's office would have to testify the Information herein was filed April 21, 1972 (A. 172).

Aponte testified further that, with certain variations which do not exist in this case, the hand stamp is the only way of determining the date of filing of any document filed in the District Court (A. 76).

Upon examining the subject Second Offender Information herein (A. 37), Mr. Aponte testified that the date of filing of the said document was April 21, 1972 (A. 78; A. 85) and that there was nothing whatever to suggest that the date stamp or the docket entry is incorrect (A. 78; A. 85).

Mr. Aponte testified further that there were no affidavits, records, logs, court orders or anything else that would indicate that the date stamped on the Second Offender Information was other than the actual date of filing (A. 79); nor was there any indication in the file or on the Second Offender Information itself to indicate the document might have first been filed in the Trial Part or in the Judge's Chambers (A. 80-81).

Mr. Aponte testified that neither he nor anyone that he knew of in the employ of the Clerk's office ever advised the United States Attorney that the date stamp on the Information was erroneous (A. 81); and had such occurred, there would have been an affidavit or a court order to that effect attached to the Information (A. 81).

Moreover, Mr. Aponte testified that the person who makes entries on the docket sheet ordinarily puts his or her initials on the original document at or near the date stamp—as was done in this case and appears as the letter "D" on the original (A. 37).

Additionally, documents to be docketed are ordinarily put in numerical order according to indictment number; each, in turn, is entered on the corresponding docket sheets. On April 21, 1972, after the Information herein was entered on Docket Sheet No. 72 CR 309, Aponte's testimony continued, there were no docket entries on

Docket Sheet No. 72 CR 310 (A. 174), or 72 CR 311 (A. 175), or 72 CR 312 (A. 176), but there were April 21, 1972 entries of two Second Offender Informations entered on Docket Sheet 72 CR 313 (herein Exhibit E, A. 177; Hearing Exhibit F, A. 178, and Hearing Exhibit G, A. 181). These other two Second Offender Informations are mentioned here as they were obviously entered by error on Cirillo's docket sheet (72 CR 309) on April 21, 1972. (See Motion Exhibit C, A. 34, and clarified enlargements thereof, Hearing Exhibit H, A. 184, Hearing Exhibit I, A. 185), thereafter "XXXed" out, marked *Error*, and entered correctly on 72 CR 313 (A. 177).

According to Aponte's further testimony, these other Second Offender Informations bear the same filing date stamp as the date stamp on the Information in the instant case, April 21, 1972 (A. 93); each was ultimately docketed correctly as April 21 1972; there are no indications that the date stamp on the other two Informations is incorrect or erroneous (A. 93), nor are there any affidavits or records to show any error in their date stamp (A. 93). Moreover, Mr. Aponte continued in his testimony, the docketing of all three Second Offender Informations was apparently done by the same person, on the same day (A. 96), and the person's initial appears as the letter "D" next to each filing date stamp on the said Informations (A. 37; A. 178; A. 181).

Dorothy Dean, employed six years in the Federal Clerk's office, Southern District of New York, also called by the defendant, testified that she could tell from her initial "D" alongside the filing stamp on the Second Offender Information herein, as well as the aforementioned Panica and Pierro Informations (A. 178; A. 181) that she had made the docket entry of the said Information as well as the "XXXed" out portion of docket sheet 72 CR 309, and the re-entered docket entries on 72 CR 313 (A. 117).

Ms. Dean testified she would ordinarily hand stamp important documents immediately upon receipt (A. 115) and that a Second Offender Information fell within her classification of "important" (A. 115). Ms. Dean, upon inspecting the Second Offender Information herein, found the filing date stamped thereon to be April 21, 1972 (A. 117), and saw nothing on the Information itself or the docket sheet to indicate there was any error or mistake in the said date stamped thereon, April 21, 1972 (A. 117), and saw nothing on the Information itself or the docket sheet to indicate there was any error or mistake in that date (A. 118-119).

Helen Kowalski, a legal clerk in the United States Attorney's office for seventeen years, was called by the government. She too testified the Second Offender Information herein was filed April 21, 1972 (A. 171-172); that she had no basis to believe that the date was incorrect (A. 172); that, had any error occurred in the filing of the said Information in April 1972, she would have been the person in the United States Attorney's office to be so advised (A. 170), and that she was never so advised by anyone, nor did she ever advise anyone, including the United States Attorney in April or May of 1972, or any time thereafter, that there was such an error on the Information herein (A. 170).

The defendant also called as witnesses:

Whitney North Seymour, Jr., the United States Attorney in charge of the prosecution below, who testified that he did not personally file the Information herein nor did he personally participate in any aspect of its filing (A. 139); that the Information was solely the responsibility of an Assistant United States Attorney who Mr. Seymour did not name (A. 137); that the sole and total basis of his representation to the court at sentencing relative to the alleged erroneous filing date of the Information was a statement of this unnamed

assistant (A. 138). Mr. Seymour testified that he did not know of any fact—other than his reliance on his assistant's statement—to indicate the date stamp, April 21, 1972, was actually incorrect (A. 143-144).

Arthur J. Viviani testified that he and Dean Rohrer, another Assistant United States Attorney, were the only Assistant United States Attorneys who participated with Mr. Seymour in the prosecution below. Mr. Viviani testified he had no basis or information whatever upon which to testify that the filing date stamped on the Information, April 21, 1972, was incorrect (A. 152); he did not see the stamped original prior to sentencing (A. 149); could not recollect ever advising Mr. Seymour, nor was Mr. Viviani ever advised by any clerk of the District Court or the United States Attorney's office, that the date stamp was erroneous (A. 150-151). In short, Mr. Viviani had no recollection whatever concerning the filing of the Information (A. 149).

Dean Rohrer, the only other Assistant United States Attorney who participated with Mr. Seymour and Mr. Viviani in the prosecution below, was called by the government. Mr. Rohrer testified that he had prepared the actual Second Offender Information herein (A. 157). In fact, Mr. Rohrer also testified—although at the hearing he had no independent recollection—that, from the Affidavit of Service by Mail, he served the Information via mailing on April 10, 1972 (A. 157) [see Affidavit, A. 38]. Mr. Rohrer testified that his ordinary practice would have been, after serving a document by mail, either to deliver a copy of the document to the office of the United States Attorney's clerk for filing by the clerk or to personally file the document himself (A. 158).

Mr. Rohrer testified, however, he could *not* recall filing the Information herein himself (A. 157). In fact, Mr. Rohrer had no recollection of "*filing it or not filing*

it. I simply have no recollection about the filing of this document (Second Offender Information)" (A. 163). Moreover, Mr. Rohrer had no idea, assuming, *arguendo*, that he gave the Information to the United States Attorney's clerk for filing, what became of the document after he gave the same to the clerk (A. 164).

Neither Mr. Seymour, Mr. Viviani or Mr. Rohrer had any affidavit, record, memo, diary or any written notation of any sort to support or substantiate the filing of the Information prior to April 21, 1972 (A. 59-60).

None of the above testified or claimed to have actually filed the Information at any time.

No one at all, in fact, offered proof of filing of the said Information on any date prior to April 21, 1972.

No one testified, supported, or accounted for the statement upon which Mr. Seymour represented to the sentencing court the existence of an error in the date recorded in the Clerk's office.

The decision of the court below after a hearing did not find, as a fact, that the Information was timely filed; nor that the Information was filed on a date other than April 21, 1972. (Although contrary findings on these issues may be gleaned from the result; see also fn. 1, A. 188).

POINT I

The enhanced sentence imposed herein, founded upon an untimely filed information, is void for lack of jurisdiction and inherently illegal.

A. Official, unequivocal and uncontradicted evidence established that the Second Offender Information herein was untimely filed on April 21, 1972.

Relying *exclusively* on official Government evidence, to wit, official records of the United States District Court, the testimony of Deputy Clerks of the said court, the testimony of all members of the United States Attorney's staff in charge of the original prosecution below, Defendant Cirillo established conclusively that the original trial below commenced April 17, 1972 [4] and the Second Offender Information (hereinafter Information) was not filed until April 21, 1972. *Inter alia*, appellant established unequivocally and without contradiction:

1. that the original filed Information itself bears the official clerk's "filed" stamp date of April 21, 1972 [five days after the commencement of trial] (Motion Exh. C, A. 37); the corresponding District Court docket sheet entries bear the exact same date (Motion Exh. B, A. 33-36). [These records "are presumptively correct"; see cases and discussion at B, *infra*];

2. through the testimony of Eddie Aponte, presently the Orders and Appeals Clerk of the District

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[4] This date of the commencement of trial, as all other dates relating to trial days, motions, etc., has been obtained from the same docket sheets as contain the filing date of the Information, and is equally reliable or equally unreliable.

Court, that the said Information was filed on April 21, 1972, and that there was no evidence, records logs, affidavits, court orders, anything whatever, to the contrary (A. 78-A. 79);

3. through the testimony of Dorothy Dean, the District Court deputy clerk who actually docketed the filing of the Information on the appropriate court docket sheets, that the Information was filed on April 21, 1972, and that she was aware of no evidence to the contrary (A. 118-119, A. 120-122, A. 132);

4. through Helen Kowalski, a legal clerk in the United States Attorney's office for 17 years, *who was called as a witness by the government*, who also testified that the Information was filed April 21, 1972 (A. 171-172). Ms. Kowalski testified she was the person in the United States Attorney's office whose attention would have been called to any error in the filing of the Information; nothing was brought to her attention in this regard from April 1972 to the time of the hearing, January 1977, and she had no basis to believe that the "filed" stamp date of April 21, 1972 was incorrect (A. 170, A. 172);

5. through the further testimony of Deputy Clerk Aponte, that on April 21, 1972 two other Second Offender Informations were filed against other defendants in an unrelated case, to wit, Victor Panica and Albert Pierro (72 Cr. 313), both of which other informations were dated exactly as Cirillo's Information, April 21, 1972. (See Exh. F, A. 178; Exh. E, A. 181). Inadvertently, these other informations were originally entered on Cirillo's docket sheet, on April 21, 1972, at the very moment Cirillo's Information was entered, then "xxx'd" out, and marked "ERROR" (see

Motion Ex. B, p. A. 34, also see enlarged and clarified Cirillo docket entries, Exhs. H and I, A. 17, 181), and then properly entered on their own appropriate docket sheet, 72 Cr. 313 (Exh. E, p. A. 177). As the "filed" stamp date of April 21, 1972 on the other two informations and corresponding docket entries in 72 Cr. 313 are officially correct dates, with no claim of errors of dating, this further evidences the filing of the Cirillo Information on April 21, 1972 and proves that the "filed" stamp was not mis-set.

6. that Whitney North Seymour, Jr., the former United States Attorney, who made the representation of error of the filing date herein, testified that he did not personally file the Information (A. 139). It was his understanding that one of his trial assistants had taken care of the filing (A. 137-8). In representing to the sentencing court that the filing date on the docket sheet was erroneously transposed from April 12, 1972 to April 21, 1972, he relied solely on the representations of one of his assistants (whom he did not name) (A. 138).

7. that Arthur J. Viviani, also called by the defendant, testified that he and Dean C. Rohrer were the Assistant United States Attorneys who assisted Mr. Seymour in the Cirillo prosecution (A. 147), and that he had no recollection of "*anything concerning the filing of that information*" (A. 149). Nor did Mr. Viviani recall having advised Mr. Seymour that the filing date on the docket sheets was incorrect (A. 151).

8. that Dean C. Rohrer, called by the government, the third member of the prosecution team, testified that he prepared the Information (A. 161-2), but had no recollection of filing it (A. 157, A. 163). He prepared an affidavit of service of

the Information, which bears the date of April 10, 1972 (A. 157; also A. 38). It was his practice, he testified, after serving a court paper by mail, to see that the original promptly was either delivered to the office of the clerk of the United States Attorney for filing or to personally file the document with the Clerk of the Court. However, he had no recollection of which was done in this case, or of the date of actual filing of the Information (A. 163-4).

Mr. Rohrer testified that he was never informed by anyone in the Court Clerk's office that the docket entries regarding the filing of the Information were incorrect. Nor did he recall advising Mr. Seymour prior to Cirillo's sentence that the recorded filing date of the Information, April 21, 1972, was in error (A. 164). He had no basis, Mr. Rohrer testified, upon which to advise the hearing court that the "filed" date on the Information, of April 21, 1972, was incorrect (A. 165).

Significantly, the Information is the only document in the entire case the accuracy of whose "filed" stamp date is disputed by the government. The government apparently accepts the accuracy of the court records as to, *e.g.*, the filing date of the indictment (March 17, 1972) and the commencement date of trial (April 17, 1972) (see Motion Exh. B, at A. 33). And the government apparently accepts the accuracy of filing of other documents filed and docketed contemporaneously with the Cirillo Information, bearing the exact filing stamp as does Cirillo's Information, *i.e.*, the Panica and Pierro informations and docket entries. Yet no explanation whatever has been offered by the government at the hearing below, or anywhere else, to satisfactorily account for the allegation of error as to this single document.

Indeed, the government stood so unarmed with evidence or explanation as to the alleged error of the officially documented filing date of April 21, 1972 at the hearing that at one point the government implied that *perhaps* the Information bears the April 21, 1972 stamp date as a result of foul play, pointing up an asserted lack of security regarding the stamping devices (see A. 102). This suggestion ignores, of course, the entries on the docket sheet corroborating the date on the Information, and was obviously not even credited by the court below. Such argument equally ignores the "filed" stamp on the Panica information, the Pierro information, and their respective joint docket sheet entries, none of which have been challenged by the government. At another juncture in the hearing, the government theorized that perhaps the date stamp might be incorrect because a clerk may have been looking at the bottom of the date-stamping device while holding it upside down and "April 21, 1972" appeared as "April 12" (A. 99). This attempt at legalistic legerdemain proves only that the mouth is quicker than the eye, for if what the prosecutor suggested were done, the Information would bear the date April 21, 1972 entirely in mirror-reverse.

There was no other proof at the hearing below, and none which in any fashion evidenced the filing of the Information on any day prior to April 21, 1972; none which alleged filing on any other day; none which accounted for the statement of alleged error of prosecuting attorney Seymour. Only through an Aquinian 'great leap of faith' could one attempt to conclude that April 21, 1972 was an erroneous filing date of the Information herein. However, Aquinas initiated his leap from a known, proven promontory. Below, the court positioned itself for the leap on the testimony of officials who claimed that the filing was actually correct as April 21, 1972 or others who testified that they had no

idea when the filing took place. The starting point of the leap of faith of the court below, respectfully, was not granite but quicksand.

B. The official records of the District Court, showing untimely filing of the Information on April 21, 1972, are presumptively correct and regular.

A phalanx of federal decisions holds that federal district court records "are presumptively correct." *United States* v. *Ray*, 183 F. Supp. 769, 771 (D.-Md. 1960) and cases cited therein; *accord, e.g., Brainerd* v. *Beal*, 498 F.2d 901, 902 (7th Cir. 1974), *cert. denied*, 419 U.S. 1069 ("* * * the district court's docket sheet cannot be impeached by affidavit"); *Wall* v. *United States*, 97 F.2d 672 (10th Cir. 1938), *cert. denied*, 305 U.S. 632.

The inherent reliability and regularity of official court records is evidenced in considerable measure by the established rule that a federal court may take judicial notice of its own records. See, *e.g., Chandler* v. *United States*, 378 F.2d 906, 909 (9th Cir. 1967) ("* * * a federal district court can take judicial notice of its own records, and this is the established rule"); see also *United States* v. *Russell*, 146 F. Supp. 102, 104 at n.7 (S.D.N.Y. 1955) (Weinfeld, *J.*), *aff'd*, 238 F.2d 605 (2d Cir. 1956) ("The Court here takes judicial notice of its own records").

The fact that judicial notice may be taken of official court records attests to the trustworthiness and accuracy courts themselves attribute to records such as those herein at issue, as does the presumption of regularity which attaches to them. These records are, after all, statutorily required to be maintained [Rule 55, Fed. R. Crim. Proc.] and presumptively authentic [Rule 902(4), Fed. R. Evid.].

Under the Federal Rules of Evidence, the presumption of regularity which attaches to official court records must be overcome by the party against whom it operates —in this case, the Government. See Rule 301, Fed. R. Evid.:

> "In all civil actions not otherwise provided for by Act of Congress or by these rules, a presumption of regularity imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast." [5]

This rule of evidence applies to criminal proceedings such as that at bar. Rule 1101(b), Fed. R. Evid.

In arriving at the conclusion it did, the court below misplaced its principal reliance upon the testimony of Dean C. Rohrer that he customarily filed court papers promptly after serving them by mail:

> "Dean C. Rohrer, then an Assistant United Attorney, swore to an affidavit of mailing of the second offender information to defendant's attorney on April 10, 1972, and both he and the other Assistant United States Attorney who prosecuted defendant stated that it was their regular practice to file papers with the court at or about the time they were mailed" (A. 189, citing Rule 406, Fed. R. Evid.).

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[5] In this case, the government additionally had the burden of proving the legality of its proceeding to enhance defendant's sentence pursuant to 21 U.S.C. 851. See Section C, *infra*.

Rule 406[6] confers only the status of admissibility as "relevant" upon evidence of customary practice. Far from being dispositive, "'[r]elevant evidence' means evidence having any *tendency* to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, Fed. R. Evid. Such a provision for admissibility can hardly be said to overcome the presumption of regularity herein and the substantial testimonial and physical evidence to the contrary. Indeed, Rohrer's testimony at the hearing did not expand on his identical averments in his affidavit attached to the government's papers in opposition to defendant's motion to vacate and "* * * the district court's docket sheet cannot be impeached by affidavit." *Brainerd* v. *Beal*, *supra*, 498 F.2d at 902.

* * * * *

Further error in the lower court's fact-finding process concerning the court records below was committed when the court took judicial notice of the ostensible fact that the functioning of the Clerk's Office of the District Court is error-ridden (A. 190-1; see also A. 105). The judicial noticing of such a matter was violative not only of the rules of evidence but also of the court's own past decisional expressions of same. [See *United States* v. *Russell*, *supra*, 146 F. Supp. at 104, n.1].

It is provided in Rule 201, Fed. R. Evid., *inter alia*, that:

> "(b) *Kinds of Facts.* A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or

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[6] "Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice."

> (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

Clearly the court's taking of judicial notice of such a matter—not a fact—did not comport with Rule 201. In effect, the court below judicially noticed the diametric opposite of the established rule that a federal court may take judicial notice of its own records. Obviously, judicial notice of a district court's records would not be permitted if it were "generally known" and "not subject to reasonable dispute" (Rule 201, *supra*) that such records were error-ridden.

Moreover, it is provided in the sentence enhancement provisions of 21 U.S.C. § 849(b)—the dangerous special drug offender statute—that "[a] duly authenticated copy of a former judgment or commitment shall be prima facie evidence of such former judgment or commitment." See discussion, Point II, *infra*.

C. Failure to timely file the Second Offender Information prior to the commencement of trial herein, April 17, 1972, totally deprived the court of jurisdiction to enhance defendant's sentence.

On the basis of the overwhelming evidence that the Information, which herein resulted in enhancement of defendant's sentence, was untimely filed, the court below erred in declining to vacate the illegally enhanced sentence imposed on defendant.

"[S]trict compliance by the Government with the statutory filing requirement is a prerequisite for an enhanced sentence." *United States* v. *Noland*, 495 F.2d 529, 530 (5th Cir. 1974), *cert. denied*, 419 U.S. 966; *cf.*, *United States* v. *Garcia*, 526 F.2d 958, 961 (5th Cir. 1976); *United States* v. *Cevallos*, 538 F.2d 1122, 1125 (5th Cir. 1976):

> "* * * [T]he statute [21 U.S.C. § 851, set out in full in addendum, *infra* at p. 1-a *et seq.*] prohibits an enhanced sentence unless the Government seeks it and requires that to obtain enhancement, *the Government must file an information prior to trial.* Provision for enhanced sentencing is a legislative decision, and the procedure the legislative prescribes to effectuate its purpose must be followed." *United States* v. *Noland, supra,* at 531. (Emphasis ours.)

The mandatory language of the statute allows for no doubt that the filing of an information by the government before trial or guilty plea is an inviolable condition precedent to an enhanced sentence thereunder:

> "No person who stands convicted of an offense under this part *shall be sentenced to increased punishment* by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court * * *" (Emphasis as supplied in *Noland, supra,* at 533.)

As the Fifth Circuit observed in *Noland, supra,* "* * * the new statutory scheme contemplates prosecutorial discretion to seek enhancement" and "[i]n granting this discretion to the prosecution, Congress imposed a strict condition on its exercise. Section 851 is phrased in mandatory language." 495 F.2d at 533. Moreover,

> "[t]he importance of the time of filing is emphasized *first,* by section 851's provision for postponement of the trial if the United States attorney cannot obtain the evidence of previous conviction in time, and *second,* by the provision for rectification of clerical mistakes in the information at any time before sentencing * * *." *Id.* (Original italics).

The Fifth Circuit in a later case, *United States* v. *Cevallos, supra,* further elucidated the absoluteness of the requirement of strict compliance with Section 851. In *Cevallos,* timely *filing* of the second offender information was conceded by the defendant therein, whose attack on his enhanced sentence was limited to the issue of whether there had been strict compliance with the statute's requirement of *service* of the information on his counsel. On the authority of *Noland,* the Fifth Circuit assumed, albeit in *dictum,*

> " * * * that a failure by the Government strictly to comply with § 851(a)(1)'s requirement of service of the information of previous conviction does deprive the District Court of jurisdiction to impose an enhanced sentence." 538 F.2d at 1125.

Moreover, in concluding as to the purported error of transposition of filing that "* * * the record was corrected nunc pro tunc" (A. 189), the court below committed further error. For, obviously, absent the jurisdiction-conferring act of timely filing an information, all subsequent sentence enhancement proceedings were void *ab initio.*[7] The United States Attorney, the defense attorney and the court were powerless—through any device: consent, waiver, or *nunc pro tunc* amendment—to alter the untimely filing of the Information. See *United States* v. *Cevallos, supra,* 538 F.2d at 1127-8; *cf., Hill* v. *United States,* 368 U.S. 424, 430 (1962).

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[7] For cases showing that the government, even in the prosecution of major narcotics figures, has mis-filed informations designed to enhance punishment, see, *inter alia, United States* v. *Tramunti,* 377 F. Supp. 6, 8 (S.D.N.Y. 1974), *aff'd* 513 F.2d 1087 (2d Cir. 1975); *United States* v. *Sutton,* 415 F. Supp. 1323, 1327 (D.—D.C. 1976), *aff'd* 511 F.2d 448 (D.C. Cir.); *United States* v. *Noland, supra; cf., United States* v. *Bailey,* 537 F.2d 845, 847-8 (5tl. Cir. 1976).

D. The government utterly failed to sustain its burden—which the lower court erroneously shifted to appellant—to justify the timeliness and therefore the legality of its procedures in seeking second offender punishment herein.

Implicit in the decision of the court below is its casting onto appellant of the burden of proving at the hearing that the second offender information was not timely filed. For the court concluded that:

> "[t]he defendant has failed to sustain his claim that the second offender information was filed subsequent to the commencement of trial" (A. 189).

This mis-placement of the burden of proof exemplifies the procedural and fact-finding errors endemic of the lower court's determination and suggests a predilection that may have brought the court below to its erroneous result.

Timely filing of a second offender information is a jurisdictional condition precedent of sentence enhancement under 21 U.S.C. § 851. See subsection C, *supra*. And the law is well settled that

> " * * * the party alleging compliance with the jurisdictional prerequisites of the district courts has the burden of proving them * * *." *DeLorenzo* v. *F.D.I.C.*, 259 F. Supp. 193, 196 (S.D.N.Y. 1966), citing *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178, 188-189 (1936).

Accord, *Arnold* v. *Troccoli*, 344 F.2d 842, 843 (2d Cir. 1965) ("The plaintiff always has the burden of showing that the district court has jurisdiction * * * "); *Trinanes* v. *Schulte*, 311 F. Supp. 812, 814 (S.D.N.Y. 1970) ("Plaintiff, as the party asserting jurisdiction, carries the burden of proving all jurisdictional facts"); *David*

Crystal, Inc. v. *Cunard S.S. Co.*, 223 F. Supp. 273 (S.D. N.Y. 1963), *aff'd*, 339 F.2d 295 (2d Cir. 1964), *cert. denied sub nom. John T. Clark & Son* v. *Cunard S.S. Co., Ltd.*, 380 U.S. 976 (1965).

Appellant having come forward at the hearing with substantial evidence that the Information had been untimely filed (see subsection A, *supra*), it became—as, indeed, it was from the outset—the government's burden to prove the prerequisite timely filing of an information pursuant to 21 U.S.C. § 851 prior to the commencement of trial.

Patently, the government at the hearing failed hopelessly to prove anything. Not one person, not one legal document, indeed, not one scintilla of spoken or documentary evidence even whispered support or affirmation of the government's required position that the Information was filed on or before April 17, 1972—the day trial commenced.

Other than Mr. Seymour testifying he relied on the hearsay statement of an unnamed Assistant—who never surfaced to acknowledge such statement, who never testified to the veracity of such statement—who, then, testified that the Information herein was filed on April 12, 1972? No one. What evidence supports the government's fulfillment of the jurisdictional prerequisites here? None!

The government failed by any quantum of proof to support the allegation that the records of the court below were incorrect, to rebut the still-standing presumption that the records of the court are accurate and reliable.

It should be noted hereat that in a literally uncountable number of cases, untimely filed Notices of Appeal —the jurisdictional prerequisites for appeal—have

placed the appellate process beyond the grasp of litigants claiming substantial appellate issues. See, *e.g.*, *Berman* v. *United States*, 378 U.S. 530 (1964); *United States* v. *Robinson*, 361 U.S. 220 (1960); *Felix* v. *Cardwell*, 545 F.2d 93 (9th Cir. 1976); *Pratti* v. *United States*, 350 F.2d 290, 291 (9th Cir. 1965).

Is the untimely filing of the Information here jurisdictionally different from the untimely filing of a Notice of Appeal? Indeed not.

And in cases where a party—the government included—has attempted to justify or account for a patently untimely—according to court records—filing of the prerequisite notice, it is the party attempting to show the court records to be erroneous which has the requirement to justify its claim. See, *e.g.*, *Beasley* v. *United States*, 327 F.2d 566, 567-7 (10th Cir. 1964), *cert. denied*, 317 U.S. 944.

Moreover, prosecution has been curtailed in many a case where the prosecuting officer has not initiated process within the statute of limitations. See, *e.g.*, *United States* v. *Davis*, 533 F.2d 921 (5th Cir. 1976), and cases cited therein. Is the failure to timely initiate a Second Felony Information here different from failure to initiate prosecution within the statutory time limits? Indeed not.

If allowed to stand, the lower court's decision will legitimate the ludicrous proposition that an attorney's averment that his customary practice is to timely make all filings will, without more, overcome unequivocal official Court Clerk's records showing the contrary. Yet even criminal convictions often are obtained on the validity of such records, as in cases of "bail jumping" (18 U.S.C. § 3150). See, *e.g.*, *United States* v. *Hall*, 346 F.2d 875 (2d Cir. 1965); *United States* v. *Cardillo*, 473 F.2d 325 (4th Cir. 1973); *Grant* v. *United States*, 506 F.2d 518 (8th Cir. 1974).

If, for further example, in the instant appeal, the records of the Clerk of the District Court revealed that the notice of appeal had been filed on the 11th day, quite likely the government would call for the appeal's dismissal as untimely, and would argue that an affidavit from appellant's counsel that it was his customary practice to make such filings timely could not overcome the official court records showing otherwise. Appellant simply contends that an even-handed administration of justice requires that the government's attorneys should be bound by the same rules and held to the same burden, where the official court records show untimely filing *prima facie*, to evidentially prove the records wrong. Here the lower court first improperly shifted the burden of persuasion onto appellant, and then scorned the conclusive proof he adduced. But, "[m]echanical rules must be mechanically applied in order to avoid [the] uncertainties that arise when exceptions are made." *Brainerd* v. *Beal*, *supra*, 498 F.2d at 903, quoting *United States* v. *Indrelunas*, 411 U.S. 216, 222 (1973). "A conflict on an issue such as this is of importance and concern to every litigant in a federal court * * *". *United States* v. *Indrelunas*, *supra*, at 217-218.

E. Only the government's compliance or non-compliance with the statutory requirement of pre-trial filing of the Information herein is of significance, not—as the court below mistakenly deemed—the United States Attorney's state of mind in mis-representing that it had been timely filed.

A reading of this Court's recent decisions, *In re Sutter*, 544 F.2d 179, 188 (2d Cir. 1976) and *Palermo* v. *Warden*, 545 F.2d 286, 296 (2d Cir. 1976), would lead to a conclusion that the Government's Attorney, in a matter as

significant as an error in the filing date of a second offender information, when seeking a substantially enhanced sentence, relied entirely on unverified hearsay, never personally checked the file or the actual Information, had no affidavits, record, or even scrap of paper to memorialize or document the facts for possible future litigation, actually misstated the facts to the court,[5] and at a future hearing does not even name the Assistant who made the statement relied upon (the two Assistants on the prosecution, in fact, do not support the allegation of transposition), certainly was not exercising that "reasonable degree of attentiveness to (his) responsibility to the court" (*In re Sutter*, *supra*, at 188), nor fulfilling the responsibility that "fundamental fairness and public confidence in public officials requires (of) prosecutors (holding them) to meticulous standards of both promise and performance." *Palermo* v. *Warden*, 545 F.2d 286, 296 (2d Cir. 1976), quoting *Correale* v. *United States*, 479 F.2d 944, 947 (1st Cir. 1973).

However, as stated earlier, the United States Attorney's state of mind in making the representation as to the filing of the Information is collateral at best, and is mentioned herein only in light of the lower court's exegesis of the matter in the opinion below. The significant factor here is the filing—regardless of intent—and that filing was fatally untimely.

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[5] As relates to the purportedly erroneous transposition of dates on the docket sheet, for the docket sheet and the Information correspond exactly as to date of filing, April 21, 1972.

F. In the face of untimely filing of the Information, proof of service on the defendant's attorney of an untimely filed information is entirely inapposite.

Also misplaced by the lower court was its reliance on a statement of the attorney who had represented appellant at trial, that he had received a copy of the Second Offender Information "some time ago" (A. 14), from which the lower court appears to have drawn the sweeping inference that the attorney meant prior to trial (A. 189).

The attorney made that statement on May 25, 1972, more than a month after the commencement of the trial on April 17th. It does not follow as a fair inference that by "some time ago" the attorney necessarily meant prior to April 17th. Ordinary usage just as readily allows the contrary inference.

Moreover, evidence of proof of service on the attorney is entirely inapposite. *Cf.*, *United States* v. *Cevallos*, *supra*, 538 F.2d at 1125-6. Just as proof of service prior to trial is of no consequence in the absence of—as here—proof of timely *filing* of an Information, so too is proof of receipt of the mailed Information. Filing must be accomplished—is the *sine qua non*—of sentence enhancement and all the mailings and receptions of mailing do not change the legislative mandate one whit.[9]

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[9] An affidavit of Albert J. Krieger, defendant's trial counsel, dated September 1, 1976, is submitted to this Court in a Supplementary Appendix at S1 *et seq.* This affidavit makes obvious the fact that Mr. Krieger's reception of the Information—at whatever date it was received—in no fashion influenced, restrained or hindered the government from a timely filing of the Information.

Consequently, while the court below stated that " * * * the failure to obtain an affidavit from (defendant's trial counsel) or to offer his testimony upon the hearing, or to explain the failure to produce his testimony is of great significance" (A189-190) [citations omitted], the court below has not suggested of what significance it assertedly was.

The foregoing also points up a *non sequitur* in the decision of the court below wherein it inferred, solely from the non-objection of the defendant's trial attorney to the *nunc pro tunc* amendment of the docket entries, that he " * * * clearly would not have consented to the correction had the facts been otherwise" [than as represented by the United States Attorney] (A189). Again, the court below misplaced proper emphasis, for the timely filing of the Information is the essence, not the mailing, not even the docket entry. The United States Attorney never suggested a *nunc pro tunc* change of the filing date or the "filed" date stamp on the Information. Nor could the jurisdiction conferred by such filing be waived—or was such a waiver intended (see Kreiger affidavit, S1—by an attorney or a defendant (see subsection C, *supra*).

The government may hardly induce compliance with the mandates of the statute (21 U.S.C. § 851) through misrepresentations and then contend that such compliance is effective. In fairness, such a contention was neither urged by the government in the court below, nor made part of the court's *ratio decidendi*.

POINT II

The essence of the enhancement statute herein is reliance upon official court records.

It is, of course, elementary that statutory provisions for the enhancement of sentences on the basis of prior convictions—such as 21 U.S.C. § 851—have as their very essence, as the exclusive means to this sentencing end, dependence upon official court records to establish such prior convictions.

The court below, as an essential part of its decision denying defendant's application to vacate an illegal sentence, judicially noticed that:

> "I don't need a witness to testify to (the fact that errors occur in the criminal clerk's office). The Court will take judicial notice of it, in terms of its own experience, and even go beyond it to say that papers frequently can't be located, they are lost" (A. 105).

Additionally, in the rendered decision, the court below held:

> "* * * errors and delays in the filing of documents in the Clerk's office are, unfortunately, by no means uncommon." (A. 190-A. 191).

Such judicial notice, presumably taken pursuant to Rule 201, Fed. R. Evid., as outlined in Point I, Sub. C, *supra*, constitutes a judicial finding that the ostensible errors and delays of the Southern District Court Clerk's office are "generally known within the territorial jurisdiction of the trial court" or are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Rule 201(b), *supra*.

However, the evidence below revealed no hint of error in the records of this case except for the single, unsubstantiated representation of the U.S. Attorney at sentencing. Close scrutiny of such claim of error at the hearing proved the same to be unsupported even by the assistant U.S. Attorneys actually responsible for the filing of the said Information. Yet the court below, by its incantation of judicial notice conjured up an apparition of chaos and confusion in the Clerk's office—without a shadow of evidence in support thereof—in an attempt to veil the otherwise impenetrable and untraversable wall of official proof that the Information herein was untimely filed April 21, 1972. (See Point I, Sub. A, *supra*).

The government now urges this Court to affirm, and thus endow with the imprimatur of the Court of Appeals, the finding below that the records of the Southern District Court Clerk's office are error-ridden and unreliable.

Such an affirmance would, however, totally ignore and actually destroy the legislative design woven into the sentence enhancement provisions of the Comprehensive Drug Abuse Prevention and Control Act of 1970 [21 U.S.C. §§ 849(b), 851(c)(1)] as applied within the vicinage of this Circuit. For the statutory mandate can only be accomplished by reliance upon court records of prior convictions. Indeed, how else can a prior conviction be proven other than by reliance upon court records?

A prior conviction of a crime—indeed, any defendant's prior criminal record—is not a being *in esse;* it is not a *res;* it cannot be described by eyewitnesses. It is merely a memorialized, recorded fact which exists solely in the records of the clerk of the court in which the conviction was obtained. How was the United States At-

torney even aware that the defendant Cirillo had a prior conviction in the Southern District Court in 1945, as is alleged in the Information, except by total and unquestioning reliance on the District Court's records? Moreover, how would the government, assuming defendant Cirillo had denied the allegations of the Information, ever have proved Cirillo's prior conviction beyond a reasonable doubt at the compulsory hearing other than by introduction into evidence of, and total reliance upon, the very records of the very court which the decision below determined are unreliable and error-ridden? [10] Yet, in this appeal, the government urges this Court to disregard clear and unequivocal court records of the very same court.

Furthermore, if, at such hearing, the defendant had attempted to counter such official and documentary evidence by asking the hearing court to judicially notice that the proffered records were error-ridden and unreliable, undoubtedly the government would scorn such a contention and would cite as authority against it the very cases and rules of evidence relied on by appellant herein (see Point I, Sub. B, *supra*).

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[10] The statute herein at issue, 21 U.S.C. § 851, requires that, in the event of a defendant's denial of a conviction alleged in a Second Offender Information, the government must establish such conviction by proof beyond a reasonable doubt (21 U.S.C. § 851 (c)(1), set out in addendum, *infra*, at 2-a). This "reasonable doubt" quantum of proof typifies such enhancement statutes. [See, *e.g.*, N.Y. Crim. Proc. Law §§ 400.20(5) (predicate felony sentencing), 400.21(7)(a) (persistent felony sentencing); compare, 21 U.S.C. § 849(b) (dangerous special drug offender sentencing), where, although the government's burden is a "preponderance," it is provided that "a duly authenticated copy of a former judgment or commitment shall be *prima facie* evidence of such former judgment or commitment."]

This Court's acceptance of the government's argument herein, and affirmance of the decision below, would in fact signal the illegality of all attempted enhanced sentences hereafter imposed by any federal or state court founded upon a prior conviction on record in the Southern District Court of New York. For, if it be generally known and judicially recognized by the Court of Appeals that the official records on file in the Clerk's Office of the United States District Court for the Southern District of New York are error-ridden and unreliable how could any prosecutor ever propose to prove a prior conviction recorded therein beyond a reasonable doubt?

The answer to this question is obvious; and in that answer resides the logical and necessary result that should be reached in this instant appeal. Even-handed justice requires nothing less than that the uncontradicted court records be recognized as correct, regular and reliable.

CONCLUSION

The decision and order below should be vacated, a finding entered that the Second Offender Information was untimely filed, and the matter remanded for resentencing in light thereof.

Respectfully submitted,

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ADDENDUM

21 U.S.C. § 851:

Proceedings to establish prior convictions—
Information filed by United States Attorney

(a)(1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

(2) An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.

Affirmation or denial of previous conviction

(b) If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform

him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

Denial; written response; hearing

(c)(1) If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the United States attorney. The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. The failure of the United States attorney to include in the information the complete criminal record of the person or any facts in addition to the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1) of this section. The hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law.

(2) A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

Imposition of sentence

(d)(1) If the person files no response to the information, or if the court determines, after hearing, that the person is subject to increased punishment by reason of prior convictions, the court shall proceed to impose sentence upon him as provided by this part.

(2) If the court determines that the person has not been convicted as alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law, the court shall, at the request of the United States attorney, postpone sentence to allow an appeal from that determination. If no such request is made, the court shall impose sentence as provided by this part. The person may appeal from an order postponing sentence as if sentence had been pronounced and a final judgment of conviction entered.

Statute of limitations

(e) No person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.

Rec'd. 3/8/77
M. Rothenberg
U.S. Attorney's
Office

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